IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

JOHN DAVID GIBBONS,
*Appellant*.

No. 2 CA-CR 2013-0129
Filed October 2, 2014

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
*See* Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

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Appeal from the Superior Court in Cochise County
No. CR89000101
The Honorable Wallace R. Hoggatt, Judge

**REVERSED**

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COUNSEL

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Joseph T. Maziarz, Section Chief Counsel, Phoenix
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*Counsel for Appellee*

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**MEMORANDUM DECISION**

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller concurred and Judge Espinosa specially concurred.

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E C K E R S T R O M, Chief Judge:

**¶1** Appellant John Gibbons appeals from the trial court's finding of a probation violation and imposition of a jail term as a condition of his reinstated probation. For the following reasons, we reverse.

**Factual and Procedural Background**

**¶2** In January 2013, law enforcement officers responded to a 9-1-1 call from a seven-year-old child. The child, J.G., told the dispatcher that "his father had been in a fight and he needed to get the cops down to his house immediately."

**¶3** Upon arrival, the first officer to respond found J.G. standing outside his father's trailer. The officer then found J.G.'s father, Gibbons, in the trailer next door with his two brothers. All three men were highly intoxicated, to the point of being unable to stand up or speak coherently. Gibbons was so intoxicated that he had "fouled himself."

**¶4** J.G. indicated that he and his younger brother had been left alone in the trailer long enough to watch a movie. After the movie ended, J.G. went next door and called for his father "for a long time," but Gibbons did not respond. J.G. also reported that his Uncle Eddie had "beat up" his father and that he could hear the fighting.

**¶5** The state filed a petition to revoke Gibbons's probation. The petition alleged that Gibbons had violated condition number 1 of his probation, which required him to "[o]bey all . . . state . . . laws," by having committed child abuse and "child neglect." The

trial court dismissed the allegation of child abuse due to insufficient evidence, but found child neglect pursuant to A.R.S. § 13-3619 proven. The court reinstated Gibbons on lifetime probation and ordered that he serve 365 days in jail. Gibbons filed a timely notice of appeal. This court has jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(3).

**Sufficiency of the Evidence**

**¶6** Gibbons maintains the evidence was insufficient for the trial court to find that he violated his probation by committing the crime of child neglect pursuant to § 13-3619. A violation of probation must be established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3); *State v. Elmore*, 174 Ariz. 480, 483, 851 P.2d 105, 108 (App. 1992). We will not overturn a finding of a probation violation "'unless the finding is arbitrary or unsupported by any theory of evidence.'" *State v. Vaughn*, 217 Ariz. 518, ¶ 14, 176 P.3d 716, 719 (App. 2008), *quoting State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (App. 1999).

**¶7** A person violates § 13-3619 if by abuse, neglect, or immoral associations, he endangers the life of a child, injures the health of a child, or imperils the moral welfare of a child. The trial court found that Gibbons had not endangered the lives of the children, but found he had injured the health of the children and imperiled their moral welfare "by reason of not being supervised," which we take to mean neglect.[1] Gibbons argues the trial court applied an incorrect legal definition in finding that he had injured his children by neglect pursuant to § 13-3619. He claims the court erroneously applied a definition borrowed from a child dependency statute, A.R.S. § 8-201(24), under which risk of harm is sufficient, whereas § 13-3619 requires that the neglect result in actual harm. The record before us supports Gibbons's contention.

[1]We make this assumption because "neglect" is the closest analogue to "lack of supervision" and because the court referred to Gibbons's alleged probation violation as "child neglect."

**¶8** During the hearing, the trial court cited the definition of neglect from the current § 8-201(24).[2] The court then stated, "[A]lthough no harm actually occurred to the child[ren], . . . the law does not require that the child or children actually be harmed, only that an unreasonable risk of harm be caused to . . . the children's health or welfare." But under § 13-3619, the neglect must cause the minor's "health to be injured." By its plain language, this clause of the statute requires actual harm; a risk of harm is insufficient.[3] *See Rineer v. Leonardo*, 194 Ariz. 45, ¶ 7, 977 P.2d 767, 768 (1999) ("'[T]he best and most reliable index of a statute's meaning is its language.'"), *quoting Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991) (alteration in *Rineer*). The court therefore erred in concluding Gibbons had violated § 13-3619 by injuring the health of his children simply because he had created a risk of harm.

**¶9** The state maintains that physical injury is not required, that mental or emotional injury may also suffice, and that we could therefore affirm the trial court's finding on that basis. However, the trial court expressly found that "no harm actually occurred," and we do not second-guess the trial court's findings on questions of fact

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[2]The court expressly referred to § 8-201(22), as this provision was previously numbered. *See* 2014 Ariz. Sess. Laws 2d Spec. Sess., ch. 1, § 10.

[3]Furthermore, definitions from the dependency context are not necessarily applicable in the criminal context. Dependency proceedings are civil in nature, *see In re Maricopa Cnty. Juv. Action No. J-75482*, 111 Ariz. 588, 592, 536 P.2d 197, 201 (1975), and are intended to protect children and rehabilitate families when possible, rather than to punish offenders. *See* A.R.S. §§ 8-451(B) (purpose of department of child safety to protect children; to achieve purpose department shall "strengthen the family and provide prevention, intervention and treatment services"), 8-846(A) (department of child safety generally required to provide services to child and child's parent to facilitate reunification); *San Bernardino Cnty. Dep't of Pub. Soc. Servs. v. Superior Court*, 283 Cal. Rptr. 332, 340 (Ct. App. 1991) ("[D]ependency proceeding is intended to be rehabilitative—not punitive.").

when they find support in the record. *See Shooter v. Farmer*, 235 Ariz. 199, ¶ 4, 330 P.3d 956, 957 (2014) (per curiam).

**¶10** The state emphasizes that the trial court also found "the health of both the [children] w[as] injured by reason of not being supervised." And the state argues that these seemingly contradictory findings can only be harmonized if we construe the latter finding to imply that the children suffered mental or emotional injury, but not physical injury.

**¶11** We cannot agree for two reasons. First, the state did not present its current theory—that Gibbons caused mental or emotional injury to the children—to the trial court. We think it unlikely the court would have ruled on a theory of injury, not expressly articulated in § 13-3619, that was not before it. Second, immediately after stating that no harm had occurred, the trial court added that risk of harm was sufficient. In context, the conclusion that Gibbons had injured the health of the children appears to have been based on the application of an incorrect legal definition, as noted above. *See Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001) ("[A] court abuses its discretion where . . . [it] commits an error of law in reaching the decision.").

**¶12** Even assuming that we can either ignore the trial court's explicit finding or interpret it in the manner the state suggests, and further assuming that § 13-3619 was intended to criminalize neglect causing emotional injury, the state presented insufficient evidence from which the court could make such a finding. Notably, in the same chapter of the criminal code, A.R.S. §§ 13-3601 through 13-3625, the legislature expressly criminalizes acts or omissions causing "serious emotional damage" to children and requires that such injury be "serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist and is caused by the acts or omissions of an individual who has the care, custody and control of a child." § 8-201(2); *see* § 13-3623(F)(1).[4] Here the state presented

[4]As noted above, we generally do not look to dependency definitions in the criminal context. But § 13-3623(F)(1) explicitly

neither evidence of "severe anxiety, depression, withdrawal or untoward aggressive behavior" nor the testimony of a medical doctor or psychologist that either of the children was emotionally damaged. Thus, even assuming § 13-3619, the alleged violation here, was intended to similarly criminalize injury to emotional health, the state presented insufficient evidence to satisfy our legislature's definition of emotional injury.

**¶13** The only evidence which would concretely support a finding of such an injury was that J.G. was "frantic[]" when he called 9-1-1. But the record suggests J.G.'s distress arose not from the fact that Gibbons had left him unsupervised, but rather from concern for Gibbons's well-being.[5] Furthermore, although we do not dispute that children may be emotionally harmed by exposure to violence, nothing in the record demonstrates that J.G. or his sibling were present when the fight occurred. Moreover, the state presented no evidence that J.G. suffered more than temporary distress and no evidence that J.G.'s sibling suffered even that. Because there was no other evidence presented that either of the children suffered a diagnosable emotional injury, as distinguished from temporary distress, we cannot uphold the trial court's finding of a violation of § 13-3619 based on a mental or emotional injury, even assuming that statute was intended to criminalize such injuries.

**¶14** However, the trial court found, in the alternative, that Gibbons had violated § 13-3619 because the moral welfare of the children had been "imperiled by reason of not being supervised." The record demonstrates that (1) Gibbons had left the children unsupervised for at least the length of a movie, (2) J.G. witnessed Gibbons in a state of extreme intoxication and either heard or saw a

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states that the definition of child abuse, for purposes of that section, should be taken from § 8-201.

[5] During the 9-1-1 call, J.G. asked for the police to come because his father had been in a fight. When officers arrived, J.G. "was yelling . . . that his uncle had run down the street, that there had been a fight."

physical altercation between his father and uncle, and (3) Gibbons did not respond when J.G. repeatedly called for him.[6]

**¶15** Although the statute does not further define or describe what type of conduct constitutes imperiling the morals of children, our supreme court has held that statutes protecting children's morals "have a long history of common-law interpretation which renders sufficiently clear and meaningful language which might otherwise be vague and uncertain." *Brockmueller v. State*, 86 Ariz. 82, 84, 340 P.2d 992, 994 (1959). Following this precedent, we therefore must ascertain the common law meaning of imperiling a child's "moral welfare." § 13-3619. Here, Gibbons's irresponsibility left the children without adult supervision for several hours. But we have found no case law, and the state has cited none, from Arizona or other jurisdictions, where merely failing to supervise a child has been found to injure or imperil a child's moral welfare.[7] Rather, those cases finding moral harm or endangerment have each involved persons who actively encouraged minors to participate in some form of immoral or illegal conduct. *See, e.g.*, *State v. Locks*, 94 Ariz. 134, 136, 382 P.2d 241, 242 (1963) (defendant store owner asked minor "if he would like to look at some 'Girlie' magazines" and sold said magazines to minor); *Brockmueller*, 86 Ariz. at 83, 340 P.2d at 993 (defendant encouraged seventeen-year-old girl to "allow certain motion pictures to be taken of her in the nude"); *Loveland v. State*, 53 Ariz. 131, 132-33, 86 P.2d 942, 942-43 (1939) (defendants provided minor with alcohol and caused her "to drink and consume intoxicating liquors"); *State v. Bailey*, 125 Ariz. 263, 265, 609 P.2d 78, 80 (App. 1980) (defendant "French-kissed" ten-year-old girl); *State v.*

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[6]To commit child neglect pursuant to § 13-3619 a person must have "knowingly cause[d] or "knowingly permit[ted]" a child to be exposed to the conditions listed in the statute. Gibbons maintains that because he was intoxicated, his actions toward the children were not "knowing," but rather "reckless[]." However, voluntary intoxication "is not a defense for any criminal act or requisite state of mind." A.R.S. § 13-503.

[7]We granted the parties leave to file supplemental briefing on this particular question.

*Hixson*, 16 Ariz. App. 251, 252, 492 P.2d 747, 748 (1972) (defendant kissed thirteen-year-old girl and gave her a cigarette); *State v. Cialkowski*, 227 N.W.2d 406, 406 (Neb. 1975) (defendant persuaded minor girls "to enter a dancing contest in a place akin to a roadhouse and during the dances to bare breasts and/or buttocks"); *Commonwealth v. Randall*, 133 A.2d 276, 279 (Pa. Super. Ct. 1957) (defendant furnished alcohol to minors and, while scantily clad, invited them to sit on his lap and have sex with him); *State v. Michau*, 583 S.E.2d 756, 758 (S.C. 2003) (defendant offered minor "marijuana and beer in exchange for sex").

**¶16** With respect to morals, a violation of § 13-3619 requires that a person imperil a child's moral welfare through abuse, neglect, or immoral associations. Here, the record suggests the trial court concluded that Gibbons imperiled the moral welfare of his children by neglect, specifically by a lack of supervision. But the court did not articulate how that neglect imperiled the children's morals, nor did the state present any evidence of any potential moral impact on them. Nor can we find any evidence in the record of actions or potential actions by the children, damaging their morals, that the neglect facilitated. To the extent the trial court may have concluded that leaving the children unattended for several hours, given their age, inherently imperiled their morals, we can find no language in § 13-3619 suggesting the legislature intended to so broadly criminalize, under the moral imperilment clause, irresponsible parenting.[8]

**¶17** Thus, Gibbons's conduct can be characterized as egregiously poor parenting and the trial court was correct that such behavior meets the definition of parental neglect as defined in our

[8]As the trial court noted, Gibbons was additionally forbidden from consuming alcohol under the probation conditions. But, as the court correctly observed, because the state did not allege a violation on that ground, the court was limited to the allegations in the petition. *See* Ariz. R. Crim. P. 27.6; *State v. Rivera*, 116 Ariz. 449, 452, 569 P.2d 1347, 1350 (1977) (rules of criminal procedure and due process require "written notice of the alleged violations prior to the revocation hearing").

dependency statutes. *See* § 8-201(24). But, for the foregoing reasons, the trial court erred in finding sufficient evidence that Gibbons committed a criminal act as described in § 13-3619. *See Vaughn*, 217 Ariz. 518, ¶ 14, 176 P.3d at 719.[9]

**Disposition**

**¶18** For the foregoing reasons, the trial court's finding that Gibbons violated the conditions of his probation and resulting disposition are reversed.

E S P I N O S A, Judge, specially concurring:

**¶19** I concur in my colleagues' reasoning and conclusions but write separately to emphasize that, in my view, this is a case which could potentially have met the requirements of A.R.S. § 13-3619 had the state introduced even a modicum of evidence to demonstrate the harm that the defendant's children likely suffered. I tend to agree with the state that the statute's protection extends to children's mental and emotional health. *See id.* (violation of statute for custodian of child under sixteen to "knowingly cause[] or permit[] . . . its health to be injured"); *cf. State v. Garcia*, 138 Ariz. 211, 214, 673 P.2d 955, 958 (App. 1983) ("'health' in the phrase 'serious impairment of health' . . . might be defined to include mental or emotional health" but for legislature's clear intent to limit aggravated assault statute to physical health). And in finding that "no harm actually occurred" to the children, it seems apparent the trial court was referring to *physical* harm, given its additional finding that "the health of both [children] was injured." But even if the court incorrectly identified the basis for its decision, we would ordinarily affirm for any legitimate reason supported by the

[9]Gibbons has also challenged the constitutionality of § 13-3619 based on vagueness. Although he raises a non-trivial argument, we need not reach this claim based on our disposition. *See State v. Rios*, 225 Ariz. 292, ¶ 12, 237 P.3d 1052, 1056 (App. 2010) ("To the extent possible, we avoid deciding constitutional issues if the case can be resolved on non-constitutional grounds.").

evidence. *See State v. Olquin*, 216 Ariz. 250, n.5, 165 P.3d 228, 231 n.5 (App. 2007).

**¶20** I agree with the trial court's arguably implicit determination that a seven-year-old, and a "younger child," would be significantly affected and suffer emotional and psychological injury from the neglect here, which was a direct cause of the children's exposure to alarming adult violence and extreme inebriation in this case. *Cf. Custody of Vaughn*, 664 N.E.2d 434, 439 (Mass. 1996) (noting "significant reported psychological problems in children who witness domestic violence, especially during important developmental stages"); *T.R. v. Dep't Of Children & Families*, 864 So. 2d 1278, 1280 (Fla. Dist. Ct. App. 2004) (children who witness incidents of domestic violence are "at risk of being 'harmed'—impaired mentally and emotionally"). But even under an expansive view of the statute as posited above, *see supra* ¶ 12, on the barren record before us we cannot fill in the large gaps in the evidence presented by the state. It is entirely unclear exactly what the children witnessed, whether it was both boys or only the older child, and whether they only heard the violence from next door or were actually present inside the trailer where their drunken father was beaten, as was suggested by counsel at the revocation hearing. Notwithstanding the lower standard of proof applicable to probation revocation proceedings, *see* Ariz. R. Crim. P. 27.8(b)(3) (violation established by preponderance of evidence), statutory elements are not met by conjecture or possibilities, even compelling ones as in this case.